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No. 01-896

Supreme Court, U.S.
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In The

Supreme Court of the United States

FORD MOTOR COMPANY and
CITIBANK (SOUTH DAKOTA), N.A.
Petitioners,
v.
JOHN B. McCAULEY, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF FOR TRIAL LAWYERS FOR PUBLIC JUSTICE AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

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INTEREST OF AMICUS CURIAE

Trial Lawyers for Public Justice ("TLPJ") is a national public interest law firm that specializes in precedent-setting and socially significant civil litigation.[1] Significantly, it is the only national public interest law firm that both prosecutes a broad range of class actions and has a special project dedicated to fighting class action abuse. TLPJ believes that Petitioners' attempt to expand the federal courts' diversity jurisdiction over class actions would violate fundamental constitutional principles, conflict with numerous decisions of this Court, endanger victims' rights, and increase the likelihood of class action abuse. Thus, it submits this brief.

SUMMARY OF ARGUMENT

Petitioners and their supporters urge this Court to radically alter its diversity jurisdiction jurisprudence in two respects: (1) to assert jurisdiction for the first time over state law class actions in which all the members of the proposed class assert only claims for modest amounts against the defendants, and (2) more fundamentally, to change its 150 year old policy of strictly construing diversity jurisdiction in deference to states' interests and the overwhelming case load of federal courts to an approach of liberally construing diversity jurisdiction in order to save major corporations from the alleged infirmity of state court class action practice. This Court should firmly reject this radical request.

Looking to Congress' multiple amendments to the

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[1] This Brief was authored solely by the *amicus* and counsel listed on the cover; no part was authored by counsel for a party. No one other than the *amicus* or its counsel made any monetary contributions to the preparation or submission of this brief. All parties have consented to the filing of this *amicus curiae* brief pursuant to letters filed with the Clerk of the Court.

diversity jurisdiction statute to raise the jurisdictional amount, this Court long ago surmised a Congressional intent to limit federal courts to hearing only truly significant state law cases between diverse parties. The Court also long ago noted diversity jurisdiction's inherent infringement on states' constitutional right to enact statutes for the benefit of their citizens and to adjudicate disputes arising out of those statutes in their own courts.

Based thereon, this Court has always construed diversity jurisdiction narrowly, consistently holding that multiple plaintiffs asserting separate and distinct claims which do not exceed the jurisdictional amount may not aggregate those claims in order to exceed the jurisdictional amount. In other words, separate and distinct state law claims for amounts too insignificant to qualify for federal court adjudication remain so even when joined together with enough other claims that the total amount at stake for the defendant would exceed the jurisdictional minimum.

Large corporate defendants have long tried to avoid this nonaggregation doctrine by claiming that a disproportionate share of the total damages or relief requested by all of the joint plaintiffs could be recovered by any one of them in an individual suit, such that each and every plaintiff allegedly would satisfy the jurisdictional amount. They tried this initially with attorneys' fees and punitive damages, but the lower courts overwhelmingly rejected their tactic. Now, they try it with injunctive relief.

More specifically, Petitioners ask this Court to hold that the amount in controversy is satisfied if the injunctive relief sought by the named plaintiff in the context of a class action suit would cost more than $75,000 if sought by any one class member in a hypothetical individual suit. Petitioners' approach has serious and fatal flaws.

Initially, it ignores the reality of the class action suit pending before a district court in favor of a hypothetical individual suit in which the plaintiff asks for classwide, rather than individual, injunctive relief. Further, it ignores the fact that the cost of providing classwide injunctive relief is equally attributable to all members of the proposed class, not 100% to just one plaintiff and 0% to the rest.

More fundamentally, Petitioners' approach constitutes a major violation of the nonaggregation rule. It grants diversity jurisdiction over state law class actions which, in reality, constitute nothing more than the joinder of multiple very small individual suits. Accordingly, virtually any state law class action seeking injunctive relief on behalf of a significant class would satisfy the jurisdictional amount, threatening to deluge the already overburdened federal courts with a plethora of purely state law class actions.

Beyond infringing on states' constitutional prerogatives and drastically burdening federal court dockets, Petitioners' proposed standard would gut state consumer protection statutes, as many plaintiffs would forego seeking injunctive relief in order to keep their suits in state courts. Given these consequences, this Court should refuse to radically alter its diversity jurisdiction jurisprudence at the behest of large companies seeking only to gain an advantageous forum in which to defend against the claims of millions of ordinary consumers.

This Court's precedents dictate an approach far different from that advanced by Petitioners and their *amici*. To state it simply, if the defendant's cost of complying with a proposed injunction can satisfy the amount in controversy requirement, it can only do so if it exceeds $75,000 *per class member*.

Furthermore, in cases where an injunction serves as

an alternative to monetary damages, the maximum amount of recoverable damages per class member constitutes the amount in controversy for each class member, rather than the higher cost per class member to the defendant of compliance with the injunction. This is because the parties in such cases will always agree to settle for the maximum recoverable monetary damages in lieu of more expensive injunctive relief.

Petitioners also argue that purely clerical or ministerial costs of compliance with an injunction should be included in the calculation of the amount in controversy. That argument fundamentally clashes with the nonaggregation rule, however, and it would bring virtually every state law class action of any size seeking either injunctive relief or monetary damages into the federal courts.

Finally, Petitioners alternatively seek to fall into an exception to the nonaggregation doctrine for cases in which two or more plaintiffs unite to enforce a single title or right in which they have a common and undivided interest. Because individual relief could be granted in this case to any class member without providing relief to all class members, plaintiffs below assert separate and distinct rights, not a single right in a common and undivided interest.

ARGUMENT

I. THIS COURT'S PRECEDENTS AND FUNDAMENTAL CONSTITUTIONAL PRINCIPLES MANDATE STRICT CONSTRUCTION OF THE AMOUNT IN CONTROVERSY REQUIREMENT.

A number of Petitioners' *amici* devote considerable time to detailing the supposed evils of class action practice in

state courts and the supposed virtue of federal class action practice. *See, e.g.,* Brief of *Amicus Curiae* National Association of Manufacturers in Support of Petitioners at 20-28; Brief of the Product Liability Advisory Council as *Amicus Curiae* in Support of Petitioners at 2-3 & 8-16. They do so for the purpose of persuading this Court that it would be desirable to shift a vast number of class actions from state to federal court.

Petitioners thus unabashedly call for this Court to set aside over 150 years of its jurisprudence narrowly construing diversity jurisdiction. In *Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63, 76-7 (1941), this Court succinctly summarized that jurisprudence and the good reasons for it:

> The dominant note in the successive enactments of Congress relating to diversity jurisdiction is one of jealous restriction, of avoiding offense to state sensibilities, and of relieving the federal courts of the overwhelming burden of 'business that intrinsically belongs in state courts' in order to keep them free for their distinctive federal business. [citations omitted]. 'The policy of the statute (conferring diversity upon the district courts) calls for its strict construction. The power reserved to the states, under the Constitution (Amendment 10), to provide for the determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the judiciary section of the Constitution (Article 3). …Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.' [citation

> omitted]. In defining the boundaries of diversity jurisdiction, this Court must be mindful of this guiding Congressional policy.

The deference to state governments and courts which requires the strict construction of the diversity statute does not represent mere lip service to abstract principles of federalism. Rather, it derives from the very real and concrete right and desire of states to pass laws for the benefit of their citizens and have them interpreted and implemented by their own courts which have the requisite familiarity and expertise to interpret them in accordance with legislative intent. *See, e.g., Sherwood v. Microsoft Corp.*, 91 F. Supp. 2d 1196, 1204 (M.D. Tenn. 2000) ("The state courts have an independent interest in the construction and the enforcement of Tennessee's anti-trust and consumer protection statutes. Absent a clear basis for federal jurisdiction, a Tennessee state court is the appropriate forum for such decisions.").

The other basis for the strict construction of the diversity statute--the desire not to further burden already overburdened federal courts with a wave of new state law cases--is equally concrete. As this Court noted in *Snyder v. Harris*, significant changes to the "amount in controversy" jurisprudence or to the aggregation doctrine could result in a "most noticeable" expansion of the federal case load in class actions brought on the basis of diversity of citizenship. 394 U.S. 332, 340 (1969).

In fact, that comment by the Court in 1969 constitutes a drastic understatement today. According to a Rand Institute Study, a reasonable estimate is that nearly 60% of reported class action decisions arose in state courts from 1995 to 1996. D.R. Hensler, *Class Action Dilemmas Pursuing Public Goals for Private Gain, Executive Summary* at 6 (Rand Institute for Civil Justice 1999). This represents thousands of class actions that would be shifted from state to

federal court if Petitioners and their *amici* have their way.

As part of its strict construction of the diversity statute, this Court long ago held that when two or more plaintiffs asserting separate and distinct rights of recovery join together in a single suit for convenience and economy they may not add their claims together to meet the jurisdictional minimum, but rather each must assert claims in the requisite jurisdictional amount. *Troy Bank v. G.A. Whitehead & Co.*, 222 U.S. 39, 40 (1911). Only one year after the adoption of the Federal Rules of Civil Procedure, this Court applied this principle to class actions brought under Rule 23. *Clark v. Paul Gray, Inc.*, 306 U.S. 583 (1939). These holdings comport with Rule 82's command that the Federal Rules of Civil Procedure, including their various joinder provisions, such as Rule 23, shall not be construed to extend or limit federal jurisdiction. Fed. R. Civ. P. 82. *See Snyder*, 394 U.S. at 337.

Contrary to the principles underlying the nonaggregation rule, Petitioners and their supporters ask this Court to adopt a liberal construction of the diversity statute without regard to its history and purpose based instead on their own preference for a federal forum, a parochial interest that has no place in judicial construction of a statute. This Court should decline Petitioners' invitation to discard its long-standing conservative diversity jurisdiction jurisprudence and resolve any doubt about the proper extent of diversity jurisdiction **against**, not for, its expansion.

II. IF A DEFENDANT'S COSTS OF COMPLYING WITH AN INJUNCTION CAN BE USED TO SATISFY THE AMOUNT IN CONTROVERSY REQUIREMENT IN A CLASS ACTION, THE COST TO THE DEFENDANT HAS TO EXCEED $75,000 PER CLASS MEMBER TO DO SO.

If this Court holds that the either viewpoint rule can be used to determine the amount in controversy in a class action in which class members assert separate and distinct claims for injunctive relief, TLPJ urges the Court to make clear exactly when the defendant's costs of compliance with the injunction will satisfy the amount in controversy requirement. Specifically, the Court should hold that the cost to the defendant must exceed $75,000 *for each and every named plaintiff and absent class member*, such that the total cost of compliance divided by the total number of class members exceeds $75,000.

A. Requiring the Defendant's Costs to Exceed $75,000 Per Class Member is the Only Approach Consistent With *Snyder* and *Zahn*.

In *Snyder v. Harris*, this Court held that, under the nonaggregation rule, the separate and distinct claims of all the members of a proposed class may not be added together to meet the required jurisdictional amount where none of the named plaintiffs or absent class members individually would have a claim that exceeds the required jurisdictional amount. 394 U.S. at 339-41. Subsequently, in *Zahn v. Int'l Paper Co.*, this Court held that each named plaintiff and absent member of a proposed class must satisfy the jurisdictional amount in order for diversity jurisdiction to exist. 414 U.S. 291, 301 (1973).[2]

The necessary consequence of this rule is that a federal court may have jurisdiction over a suit brought by a plaintiff individually but not have jurisdiction over a suit

[2] In that case, the claims of each of the named plaintiffs satisfied the jurisdictional amount (as presumably did the claims of the vast majority of the proposed class), but the district court found that not every individual member of the class had suffered damages in excess of the jurisdictional amount. 414 U.S. at 292.

asserting the exact same claims brought by the exact same plaintiff as a named plaintiff on behalf of a proposed class. As the Seventh Circuit explained in *In Re Brand Name Prescription Drugs Anti-Trust Litig.*, 123 F.3d 599, 609 (7th Cir. 1997) ("*Brand Name*"):

> But it is implicit in the rule that forbids aggregation of class members' separate claims that it will sometimes be more difficult for a defendant desiring to remove a diversity case to federal court to establish the minimum amount of controversy in a multiplaintiff case than in a much smaller single-plaintiff case.

Indeed, under *Snyder* and *Zahn*, a federal district court would not have jurisdiction over a 100-member proposed class action in which the named plaintiff and 98 absent members of the class had separate and distinct caims of $100,000 each and one absent class member had a claim of $74,999. This principle applies equally to class actions in which class members assert separate and distinct claims for injunctive relief, and Petitioners' entire appeal constitutes nothing more than a creative attempt to avoid its consequences.

Specifically, Petitioners and their supporters argue that if a defendant's cost of compliance with an injunction as to any one named plaintiff or absent class member would exceed $75,000, considered as if that one plaintiff had brought an individual suit seeking classwide injunctive relief, then the jurisdictional amount is met. Brief for Petitioners at 18; Brief for the United States as *Amicus Curiae* Supporting Petitioners at 25. They took this proposed standard from the Seventh Circuit's opinion in *Brand Name,* 123 F.3d at 610:

> Whatever the form of relief sought, each plaintiff's claim must be held separate from

> each other plaintiff's claim from both the plaintiff's and the defendant's standpoint. The defendant in such a case is deemed to face multiple claims for injunctive relief, each of which must be separately evaluated. [citation omitted]. … The test, we repeat, is the cost to each defendant of an injunction running in favor of one plaintiff; otherwise the nonaggregation rule would be violated.

What Petitioners and their supporters studiously avoid acknowledging, however, is that the Seventh Circuit articulated this standard in light of its prior holding that the enactment of the Judicial Improvements Act of 1990, 28 U.S.C. § 1367, had overruled *Zahn*, such that if at least one named plaintiff satisfies the jurisdictional minimum, "…the other named plaintiffs and the unnamed class members can, by virtue of the supplemental jurisdiction conferred on the federal district courts by 28 U.S.C. § 1367, piggyback on that plaintiff's claim …[e]ven though their own claims are for less than the jurisdictional minimum amount." *Brand Name*, 123 F.3d at 607 (*citing Stromberg Metal Works, Inc. v. Press Mechanical, Inc.*, 77 F.3d 928, 930-33 (7th Cir. 1996)).

In this light, the Seventh Circuit's articulation of the rule makes at least some sense. If only one named plaintiff must satisfy the jurisdictional minimum, a court could look to see if the cost of providing injunctive relief to just that one plaintiff would exceed $75,000 if it were sought by that named plaintiff in an individual suit. The court would have supplemental jurisdiction over the remaining named plaintiffs and absent class members without regard to whether the cost of injunctive relief would exceed $75,000 for each and every

one of them in the class context.[3]

In this case, Petitioners have *stipulated* that they do not seek to have this Court revisit *Zahn*, but rather that they merely ask this Court to apply *Zahn* to class claims for injunctive relief. Reply Brief for Petitioners in Support of Certiorari at 5. Accordingly, the standard for ascertaining the amount in controversy from the defendant's viewpoint articulated in *Brand Name* cannot govern in this case in which the continued vitality of *Zahn* has not been challenged.

As set forth above, under *Zahn*, the amount in controversy must be satisfied as to each and every named plaintiff and absent class member. Crucially, this must be done in the context of the actual class action suit before the district court and the classwide injunctive relief sought in that suit, not based upon a hypothetical and highly unlikely suit in which an individual class member seeks classwide injunctive relief, as Petitioners and their supporters urge.

The facts of this case convincingly demonstrate this proposition. The named plaintiffs sought specific performance of their contracts providing for the rebate program. Should Petitioners choose to accomplish that by reinstating the original rebate program, no competent

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[3] *See Del Vecchio v. Conseco, Inc.*, 230 F.3d 974, 977-8 (7th Cir. 2000) ("That means, for Del Vecchio, that the amount in controversy from the defendants' point of view is the amount they risk paying **him**, not the amount they might have to pay the entire class.") (emphasis in original); *Hoffman v. Vulcan Materials Co.*, 19 F. Supp. 2d 475, 482 (M.D.N.C. 1998) ("The plaintiffs have each requested in excess of $30,000 in damages in addition to an injunction. Therefore, if defendant can show that the injunction is worth more than $45,000 to **any one plaintiff**, then plaintiffs' motion to remand must be denied.") (emphasis added); *Rodgers v. General Electric Capital Corp.*, 1998 WL 128675 at 4 (N.D. Ill. 1998) ("Accordingly, we must consider the cost to GECC of complying with an injunction running in favor of **Rodgers alone**.") (emphasis added).

economist or accountant would attribute the entire fixed cost of reinstating the program to one class member alone and attribute no portion of the fixed cost of reinstatement to all the other class members. Rather, he or she would divide the total fixed cost of reinstatement by the total number of class members and attribute to each class member that class member's proportionate share of the fixed cost.

That proportionate share attributable to each class member constitutes the amount in controversy for each class member under *Zahn*. Simply put, the proper method for calculating the amount in controversy for each named plaintiff and absent class member asserting separate and distinct claims for injunctive relief is to take the total cost to the defendant of compliance with the injunction and divide it by the number of members in the proposed class. Only if that results in a quotient that exceeds $75,000 has the plaintiff or removing defendant met the *Zahn* requirement that the cost of compliance with the injunction must exceed $75,000 as to each and every named plaintiff and absent class member.

Even under the Seventh Circuit's approach in *Brand Name* of determining only the amount in controversy as to one named plaintiff, the amount in controversy should be measured in the context of the actual class action case pending before the court, not in a hypothetical individual suit in which the named plaintiff inexplicably seeks classwide injunctive relief. In the context of that class action, a competent economist or accountant would, likewise, attribute to the named plaintiff an amount in controversy equal only to that named plaintiff's proportionate share of the defendant's cost of providing the classwide injunctive relief.

A number of district courts have properly applied the defendant's viewpoint of the amount in controversy in this manner. For example, in *Littleton v. Shelter Ins. Cos.*, 2000 WL 356408 at 2 (S.D. Ill. 2000), the district court took the

defendant's claimed cost of complying with the requested injunctive relief of $802,755, divided it by the approximately 541,947 class members and concluded that the cost to the defendant of injunctive relief in favor of the named plaintiff (and, consequently, to each of the absent class members) amounted to about $1.50, far less than the jurisdictional requirement.

Similarly, in *Sherwood v. Microsoft Corp.*, the district court noted that Microsoft's estimate of the cost of providing the injunctive relief sought by the plaintiffs, $58.5 million, when divided by anything more than 710 class members, would "...bring the apportionment of that total cost among each class member to less than $75,000 per class member." 91 F. Supp. 2d at 1203. Thus, that district court held that the jurisdictional amount had not been met. *Id.*

As another district court put it, "Even the Seventh Circuit, which seems to have adopted the 'either viewpoint' (i.e., plaintiff or defendant)...seems also to suggest that if the defendant's cost is considered, it must then essentially be divided by the number of potential plaintiffs." *Melnick v. Microsoft Corp.*, 2000 WL 761013 at 1 fn. 1 (D. Me. 2000) (*citing Brand Name*, 123 F.3d at 609-10). Only Petitioners and their supporters, by virtue of assessing the defendant's cost of compliance with an injunction in the context of a fictional individual suit in which the named plaintiff seeks classwide injunctive relief, would attribute the entire fixed cost of providing classwide injunctive relief to just the named plaintiff.

The fictional and improper nature of Petitioners' suggested approach of valuing the cost to a defendant of providing the relief requested in the actual class suit as if it had been brought in an individual suit by the named plaintiff is easily demonstrated. In this case, for example, it is highly unlikely that a plaintiff in an individual suit against

Petitioners would request reinstatement of the prior program set up to accrue credits for millions of people or that any court would consider this a realistic request for relief.

Rather, any plaintiff in an individual suit would request a court to order Petitioners to honor the terms of his contract by keeping track of his purchases, which would require nothing more than one employee reviewing his bills each month and keeping a running tally. Even if the plaintiff were to ask for reinstatement of the entire program, it is highly unlikely that any court would consider such a request for relief to be potentially recoverable and thus a realistic basis for calculating the amount in controversy.[4]

Consistent with this analysis, the district court in *Smiley v. Citibank (South Dakota), N.A.*, 863 F. Supp. 1156, 1164-5 (C.D. Cal. 1993), rejected Petitioners' exact argument as follows:

> The Court finds two flaws with this argument. First, while Smiley may have been able to bring this action as an individual, she clearly did not do so; it is undisputed that she brought the case on behalf of all other similarly situated Citibank cardholders. Moreover, if Smiley had brought an action purely on behalf of herself it is not at all clear that she could obtain the kind of sweeping injunctive relief order that she seeks here on behalf of all present and potential future Citibank cardholders.

[4] Petitioners attempt to use this argument as support for the proposition that the class members below sought to enforce a single title or right in which they had a common and undivided interest. Brief for Petitioners at 25. As set forth in Section IV below, this argument has no merit.

For that reason, the court refused to calculate the amount in controversy as to just the named plaintiff based upon the classwide injunctive relief she had requested in her actual class action suit. *Id.*

In cases like this one where the requested injunctive or other equitable relief serves as an alternative form of relief to monetary damages, the economics of settlement dictate that the amount in controversy is even less than the defendant's cost of compliance per class member. In this case, for example, they dictate that the amount in controversy does not exceed $75,000 as to any one plaintiff, much less as to each and every class member.

The maximum amount that any plaintiff or class member could recover as a result of this case would be $3,500, because that was the maximum credit allowed under the credit card program. Petitioners could, obviously, settle this case at any time by offering the maximum possible recovery, $3,500, to each and every plaintiff and class member.

Accordingly, Petitioners would never allow entry of an injunction against them that would cost them more than $3,500 per class member to implement. This demonstrates that the true amount in controversy between Petitioners and each and every plaintiff and absent class member does not exceed $3,500.[5] *See Brand Name*, 123 F.3d at 609 ("The defendant would be willing to pay the plaintiff up to a shade less than the cost that the injunction would impose on the defendant.... In that way the cost to the defendant would be

[5] Even if only the amount in controversy as to one named plaintiff was considered in this case, per *Brand Name*, basic economic theory dictates the same conclusion. Petitioners would never spend more than $3,500 to provide injunctive relief to any one named plaintiff, making that the true maximum amount in controversy.

transmuted into an equivalent value to the plaintiff."); *Hoffman v. Vulcan Materials Co.*, 19 F. Supp. 2d at 482 ("...[I]n cases where injunctions or declaratory judgments are requested, the value of the relief could be determined by considering...how much the defendant would be willing to pay the plaintiff to be rid of the injunction.").

In summary, requiring that the defendant's cost of compliance with a proposed injunction (or the maximum settlement value of the case) must exceed $75,000 per class member is the only approach that fully comports with *Snyder* and *Zahn* and with this Court's declaration that "...the amount in controversy is measured by the value of the object of the litigation." *Hunt v. Washington State Apple Advertising Comm'n*, 423 U.S. 333, 347 (1977). Petitioners' approach does not, and should, therefore, be rejected.

B. A Majority of Lower Courts Have Purported to Reject the Use of the Defendant's Viewpoint in Class Action Cases, But Their Decisions Actually Constitute Examples of the Proper Application of the Defendant's Viewpoint Pursuant to *Snyder* and *Zahn*.

Most or all of the injunction class action cases purporting to refuse to apply the either viewpoint rule (because doing so would serve to bypass the nonaggregation rule of *Snyder* and *Zahn*) actually constitute examples of the proper application of the defendant's viewpoint in the class action context. The courts in those cases, consistent with the economic realities of the cases before them, correctly treated the defendant's cost of compliance per class member as the amount in controversy for diversity jurisdiction purposes.

Unfortunately, those courts then erroneously treated that cost of compliance per class member as an application of the plaintiff's viewpoint and erroneously assumed that the defendant's viewpoint would have required them to aggregate

those amounts and consider only the total cost to the defendant as the amount in controversy in violation of the nonaggregation principles of *Snyder* and *Zahn*.[6] *See, e.g., Kanter v. Warner-Lambert Co.*, 265 F.3d 853, 858-61 (9th Cir. 2001); *In Re Ford Motor Co./Citibank (South Dakota), N.A.*, 264 F.3d 952, 960-1 (9th Cir. 2001) ("*In Re Ford*"); *Packard v. Provident Nat'l Bank*, 994 F.2d 1039, 1050 (3d Cir. 1993); *Massachusetts State Pharmaceutical Ass'n v. Federal Prescription Service, Inc.*, 431 F.2d 130, 132 fn. 1 (8th Cir. 1970); *Lonnquist v. J.C. Penney Co.*, 421 F.2d 597, 599 (10th Cir. 1970).

In *Kanter*, 265 F.3d at 858, for example, the defendant made the exact same argument as Petitioners make herein:

> Put another way, Pfizer wants us to assume for purposes of amount in controversy that a single plaintiff seeks the injunctive relief requested by Plaintiffs, and to allocate the cost to Defendants of providing the requested injunctive relief to that one plaintiff. Pfizer contends that if we were to view Plaintiffs' case in this way, the amount in controversy would exceed $75,000.

The Ninth Circuit held that the true economic value of an injunction to each plaintiff and class member would be the cost of the allegedly ineffective medication-between $9 and $17. *Id.* at 859. It then held that accepting Pfizer's argument would mean that virtually every mass-tort class action involving an incidental request for injunctive relief could

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[6] In fact, pursuant to the plaintiff's viewpoint, the amount in controversy is measured by the **value to the plaintiff** of the injunctive or equitable relief, not the cost to the defendant of providing it. *Snow v. Ford Motor Co.*, 561 F.2d 787, 788 (9th Cir. 1977).

satisfy the amount-in-controversy requirement of 28 U.S.C. § 1332. *Id.* at 861.

The Ninth Circuit was exactly correct. As it noted in *Snow v. Ford Motor Co.*, the same rules must apply to plaintiffs originally filing suit in federal court as to defendants removing them from state court. 561 F.2d at 791. Under Petitioners' argument, in order to avoid *Snyder* and *Zahn* and gain entry into federal court, all a plaintiff would have to do is plead for injunctive relief suitable for an entire class that would cost in excess of $75,000.

Thus, the fear expressed by many courts that adopting Petitioners' argument could inundate overburdened federal courts with state law diversity class actions involving very modest disputes is well founded. In this case, it would confer federal court jurisdiction over a class action that constitutes nothing more than the joinder of multiple suits for $3,500 or less. In *Kanter v. Warner-Lambert Co.*, the argument would have conferred diversity jurisdiction over the consolidation of multiple $9 to $17 suits. 265 F.3d at 859. In *Snow v. Ford Motor Co.*, it would have conferred diversity jurisdiction over the consolidation of multiple $11 suits. 561 F.2d at 790-1.

In *Smiley v. Citibank (South Dakota), N.A.*, 863 F. Supp. at 1164, the Central District of California explained well the compelling reasoning of these cases in the context of its particular facts:

> ...Smiley is seeking to protect...the alleged right of Citicorp's current and future cardholders not to have to pay the $15 late charge if they fail to pay their balance in a timely manner. The fact that plaintiff seeks a court-approved public information campaign does not through sheer alchemy transform a

> cause of action which will provide marginal benefits (in all probability, well less than $100 per class member) into a claim that meets the $50,000 amount in controversy requirement. To hold otherwise would allow any class of plaintiffs who are completely diverse from the defendants to obtain federal jurisdiction merely by seeking a injunction requiring the defendant to engage in an expensive public information campaign announcing the error of his ways.

Petitioners will undoubtedly protest that a suit that could result in them incurring expenses exceeding $75,000 in order to provide the requested injunctive relief does not constitute a trivial state law suit of the sort that the $75,000 jurisdictional amount seeks to keep out of federal court. This protestation ignores that, pursuant to the nonaggregation rule as pronounced in *Synder and Zahn*, a class action seeking millions of dollars in total damages or other relief nevertheless constitutes nothing more than the consolidation of multiple individual state law suits seeking recovery of trivial amounts.

Looking to the economic realities of this litigation, it could not be more clear that the amount in controversy as to the named plaintiffs and as to each of the absent class members does not exceed $3,500, much less $75,000. Given the absence of a federal question, this state law suit joining multiple $3,500 or less claims belongs exclusively in state court.

C. The Approach Advocated by Petitioners and *Amici* Would Severely Damage Significant Federal and State Interests.

The approach advocated herein would leave the

current federal-state balance undisturbed. In contrast, the approach advanced by Petitioners and their *amici* would significantly expand federal diversity jurisdiction with a corresponding increase in federal court cases (and a decrease in state court cases). The exact impact will, of course, depend upon a number of factors, including the extent to which plaintiffs seeking to vindicate their rights under state consumer protection statutes simply abandon requests for injunctive relief.

In many cases brought under state consumer protection statutes, plaintiffs couple an ancillary request for injunctive or other equitable relief with the primary claim for money damages. *See, e.g., Kanter v. Warner-Lambert Co.*, 265 F.3d at 859-61; *Snow v. Ford Motor Co.*, 561 F.2d at 788. To avoid removal to federal court, many plaintiffs are likely to simply omit such claims for future injunctive relief.[7] Such a trend could be devastating to the effective enforcement of state consumer protection laws.

The deceptive trade practices acts of 33 states explicitly authorize injunctive relief. Nat'l Consumer Law Center, *Unfair and Deceptive Acts and Practices* § 8.6.2.1 (5th ed. 2001). Of the other 18 states, all but one or two allow the award of injunctive relief as a form of either "other equitable relief" or "other relief the court deems appropriate." *Id.* § 8.6.2.2.

A significant trend of plaintiffs not seeking such injunctive relief in order to remain in state court would severely diminish the effectiveness of these statutes, because injunctive relief often provides a more effective remedy to

[7] In its brief, the National Association of Manufacturers frankly admits that this is the likely result of this Court ruling in favor of Petitioners. Brief of *Amicus Curiae* National Association of Manufacturers in Support of Petitioners at 19-20.

society than damage awards, as the National Consumer Law Center explains:

> One of the potentially most effective UDAP remedies against wide spread marketplace misconduct is for a private individual to seek a court-ordered injunction preventing the seller from engaging in specified conduct in the future. A merchant may treat occasional damage awards, even if trebled or increased with punitive damages, as an acceptable cost of business, not deterring future misconduct. But a properly framed and monitored injunction can eliminate the seller's use of the challenged practice against all future customers. *Id.* § 8.6.1.

Reliance on state attorney generals to seek injunctive relief does not solve this problem, as those state officials have limited resources and their own priorities. *Id.* Indeed, recognizing that governmental enforcement alone cannot solve the problem, these statutes were specifically drafted to allow private parties to bring actions as private attorney generals on behalf of all injured members of the public and on behalf of society as a whole. *Id.*

Thus, a ruling by this Court that would discourage plaintiffs from seeking injunctive relief in order to avoid federal court jurisdiction would not only serve to destroy the effectiveness of such statutes, but would also contradict the fundamental principles underlying their enactment. Coupled with the offense to states' rights and interests and the potentially crippling increase in federal courts' caseloads that could occur, the certain damage to the enforcement of state consumer protection statutes should guide this Court to reject Petitioners' requested radical expansion of diversity jurisdiction and to affirm the decision below.

III. UNDER NO CIRCUMSTANCES SHOULD A DEFENDANT'S CLERICAL OR MINISTERIAL COSTS OF COMPLIANCE WITH AN INJUNCTION COUNT TOWARDS THE AMOUNT IN CONTROVERSY REQUIREMENT.

The discussion above has focused on how to calculate the amount in controversy from the defendant's viewpoint in a class action in which the class requests injunctive relief. Whatever standard the Court adopts, it needs to also address what costs of a defendant may be included in the calculation.

Confusingly, Petitioners argue that courts should include a defendant's "administrative costs" in the calculation of the amount in controversy. That purported category of costs has little or no meaning, however, and it clearly represents a conscious departure by Petitioners from the reasoning of *Brand Name*, which otherwise provides virtually the entire basis for Petitioners' appeal.

In *Brand Name*, the Seventh Circuit stated that there are four ways in which a request for an injunction might be thought to satisfy the amount in controversy requirement. 123 F.3d at 609. The first was the value of the injunction to the plaintiff--the plaintiff's viewpoint. *Id.* The second, third, and fourth ways are variations of the defendant's viewpoint. *Id.* at 609-10.

The second way was described by the Seventh Circuit as the cost of "some alteration in the defendant's method of doing business..." *Id.* at 609. The third way was the value to the defendant of a benefit that the plaintiff's injunction would force the defendant to forego. *Id.* at 610. The fourth way was the defendant's clerical or ministerial cost of compliance with the injunction. *Id.*

Significantly, the Seventh Circuit expressed considerable doubt as to whether clerical or ministerial costs of compliance should be included in the calculation of the amount in controversy:

> Just the cost of duplicating an injunction in a case such as this and distributing the copies to all the relevant personnel might exceed $50,000 for each defendant, and, if so, this would argue for allowing removal to federal court.... But if the argument were accepted, then every case, however trivial, against a large company would cross the threshold, whether the threshold was $50,000 or as it now is $75,000, even if the plaintiff were asking for an injunction against disclosing his unlisted telephone number. It would be an invitation to file state-law nuisance suits in federal court.

Id. It then held that it need not "bite the bullet" and decide this issue because the defendant had made no effort to quantify the internal cost of compliance with the requested injunction. *Id.*

Petitioners and their *amici* do, however, advocate counting clerical or ministerial costs of compliance in valuing the amount in controversy. Under this approach, not only would virtually any injunction against a large company cross the jurisdictional threshold, but so would many, if not most, class action damage suits against large companies. The judgments in many cases would require the defendant to draft and run a computer program on its customer database to calculate the damages for each class member and then to either credit the account of each class member or to cut a check and mail it to each class member. The cost of this could easily exceed $75,000.

Of course, the clerical or ministerial costs of complying with the injunction or of making damage payments to each class member would almost never exceed $75,000 per class member and, thus, would not satisfy the amount in controversy requirement under the standard advocated herein by TLPJ. However, under the standard urged by Petitioners and their supporters, virtually every class action requesting a large company to cease and desist from engaging in any activity or requesting payment of small amounts to a large number of class members would exceed the jurisdictional threshold, flooding the federal courts with purely state law class actions that constitute nothing more than the consolidation of multiple suits over trivial amounts.

While the Ninth Circuit's statement below that it would not consider "fixed administrative costs" for purposes of calculating the amount in controversy is admittedly vague, the Ninth Circuit made the correct ruling. Plaintiffs essentially ask for nothing more than specific performance--that is, they want Petitioners to honor their contracts and to continue accruing rebates in connection with their credit card purchases. The cost of the personnel and computers to provide that very minor individual relief on a classwide basis constitutes nothing more than clerical or ministerial costs.

Indeed, the facts of this case illustrate well why counting such clerical or ministerial costs would violate the nonaggregation rule of *Snyder* and *Zahn*. As noted previously, the cost of honoring the rebate program as to only one plaintiff would be minuscule, as one employee could review a plaintiff's bills each month and keep a running tally of his credits on a sheet of paper. The cost of reinstating the original rebate program, therefore, merely constitutes the aggregation of the minuscule costs of honoring the credit card program for millions of individual class members.

IV. PETITIONERS' ATTEMPT TO BRING THIS CASE UNDER THE "COMMON AND UNDIVIDED INTEREST" EXCEPTION TO THE NONAGGREGATON RULE SHOULD BE REJECTED BY THE COURT.

Recognizing the weakness of their argument that they satisfied the jurisdictional amount in the context of a suit by class members asserting separate and distinct rights, Petitioners alternatively argue that they fall into the exception to the nonaggregation rule for "cases in which two or more plaintiffs unite to enforce a single title or right in which they have a common and undivided interest." *See Snyder v. Harris*, 394 U.S. at 335. This Court should summarily reject this alternative argument, as the Ninth Circuit did below.

This exception has historically been limited to a very narrow class of cases in which a single plaintiff could not possibly recover relief affecting only him or her. Petitioners' requested expansion of the exception misconstrues the nature of a common and undivided interest and is at complete odds with the required strict construction of the amount in controversy requirement, thereby promising to open the floodgates of federal court to waves of new state law class actions.

Indeed, a quick survey of the *amicus* briefs filed in support of Petitioners graphically illustrates the massive influx of class actions that the federal courts can expect if this Court adopts Petitioners' argument. In addition to cases seeking injunctive relief brought pursuant to the consumer protection laws of all 50 states, Petitioners' *amici* believe Petitioners' arguments will lead to federal jurisdiction over cases where plaintiffs seek orders requiring: relabeling of products, product redesign, product repair (Brief of *Amicus Curiae* Pharmaceutical Research and Manufacturers of America in Support of Petitioners); corrective advertising,

environmental clean-up (Brief of the Product Liability Advisory Council as *Amicus Curiae* in Support of Petitioners); medical monitoring (Brief of the Business Round Table as *Amicus Curiae* Supporting Reversal); safety programs (Brief of *Amicus Curiae* National Association of Manufacturers in Support of Petitioners); and compliance with state insurance regulations (Brief of *Amicus Curiae* State Farm Mutual Automobile Insurance Company in Support of Petitioners).

Class members seek to enforce a single title or right in which they have a common and undivided interest when that interest cannot be adjudicated without implicating the interests of each and every class member. *Gilman v. BHC Sec., Inc.*, 104 F.3d 1418, 1423 (2d Cir. 1997). In other words, if the subject matter of the suit could be adjudicated on an individual basis, the class members have no common and undivided interest in the subject matter of the suit. *Id.*

The paradigm case of multiple plaintiffs seeking to enforce a single title or right in which they have a common and undivided interest involves a single indivisible res, such as an estate, a piece of property (the classic example) or an insurance policy. *Id.* It can also include cases in which a class of persons has a collective right to recover a fund of money from a defendant (subject to later distribution to the class, the terms of which distribution may be the subject of litigation between the class members), but no individual class member has a right to recover any particular part of the fund or any particular amount of money from the defendant. *See, e.g., Berman v. Narragansett Racing Ass'n*, 414 F.2d 311, 314-15 (1st Cir. 1969).

The classic example of the latter type of case is a shareholder's derivative action or a suit against a trustee in which the sum recovered would be paid into a corporate treasury or trust estate for later proportionate distribution. *Id.*

at 315. *See, e.g., Eagle v. American Tel. & Tel. Co.*, 769 F.2d 541, 546-7 (9th Cir. 1985). In such cases, a shareholder or trust beneficiary has no right to recover any specific amount because he or she holds only a common and undivided interest in the corporation's or trust's assets. *Gilman v. BHC Securities, Inc.*, 104 F.3d at 1423.

One last category of cases involving a common and undivided interest is where plaintiffs join to seek abatement of a continuing nuisance. *Packard v. Provident Nat'l Bank*, 994 F.2d at 1050 fn. 14. *See, e.g., Hoffman v. Vulcan Materials Co.*, 19 F. Supp. 2d at 42-3. In those cases, as well, relief cannot possibly be granted solely to the named plaintiff, but not to the other members of the class, because abatement of the nuisance as to the plaintiff abates it as to all class members.

As the Ninth Circuit held, this case clearly does not fall into any of these categories. *In Re Ford*, 254 F.3d at 959-60. As that court noted, the named plaintiffs and absent class members had no common and undivided interest in accruing rebates under the credit card program; each plaintiff charged purchases and accrued rebates individually pursuant to individual contracts, not as part of a group. *Id.* As noted previously, the requested injunctive relief of continuing to accrue credits, up to a maximum of $3,500, based upon credit card purchases could easily be provided to an individual plaintiff without providing similar relief to other persons or class members.

Petitioners will undoubtedly protest that regardless of what could have been done on an individual basis, the named plaintiffs in this case allegedly specifically pled for reinstatement of the entire program, which program would necessarily benefit the entire class. Crucially, however, every single court which has considered the issue has held that the nature of the underlying claim, rather than the

specific relief requested by the plaintiff, must be examined to determine whether it potentially could be vindicated individually or could only be vindicated in the context of providing relief to an entire class. *Kanter v. Warner-Lambert Co.*, 265 F.3d at 859-60; *In Re Ford*, 264 F.3d at 959-60; *Packard v. Provident Nat'l Bank*, 994 F.2d at 1050 fn. 14; *Snow v. Ford Motor Co.*, 561 F.2d at 790 ("Given *Snyder*, the proper focus in this case is not influenced by the type of relief requested, but rather continues to depend upon the nature and value of the right asserted.").

To focus on the specific relief requested, rather than the nature of the underlying claim, would lead to anomalous results. Even Petitioners would concede that the proposed class' monetary damages claims constitute the assertion of separate and distinct rights. How then can the proposed class' injunctive claims (really claims for specific performance asserted as an alternative to monetary damages) constitute the assertion of a single right in a common and undivided interest? Petitioners do not attempt an explanation. Nor could they.

Two cases present facts indistinguishable from the facts of this case. In *Kanter v. Warner-Lambert Co.*, the plaintiff sought an injunction requiring Pfizer to either change the formulation of its product to become effective (i.e., to stop selling an ineffective product) or to disclose on the label that the product is not effective. 265 F.3d at 859. Obviously, Pfizer could not easily stop selling or advertising its lice medication one consumer at a time. *Id.*

Significantly, the Ninth Circuit did not rest its decision on the specific relief requested. Rather, it looked to the nature of the right asserted by the plaintiffs, which was the right to be protected from allegedly deceptive advertising, and it found that each plaintiff could sue to vindicate that right as an individual without joining the other members of

the class in order to bring a cognizable claim. *Id.* at 860. As a consequence, it held that the plaintiffs asserted separate and distinct individual rights, not a single right in a common and undivided interest. *Id.*

In *Smiley v. Citibank (South Dakota), N.A.*, the plaintiffs sought an affirmative injunction requiring Citibank to provide a statewide advertising and public information campaign warning all California residents regarding its illegal late payment charges. 863 F. Supp. at 1164. The district court found that the right that plaintiffs sought to vindicate, the right of Citicorp's current and future cardholders not to be forced to pay a $15 late charge if they failed to pay their balances timely, constituted a separate and distinct right capable of individual vindication and that the mere fact that the plaintiffs sought a court-approved public information campaign did not convert the plaintiffs' rights into a single right in a common and undivided interest. *Id.*

The exact same reasoning applies even more forcibly in this case. The named plaintiffs and absent class members could individually sue for specific performance of their rights under their individual contracts with Petitioners. Petitioners could provide that relief to any one plaintiff without providing it to all the other class members. Thus, plaintiffs have asserted only separate and distinct rights in this case, not a single right in a common and undivided interest.

Petitioners also argue that the unlikelihood that a court would grant the classwide relief of requiring them to reinstate their entire credit card program in an individual suit brought by one plaintiff demonstrates that class members sought to enforce a single right and title in a common and undivided interest. Once again, Petitioners fail to distinguish between the specific relief requested by plaintiffs and the nature of their underlying claims, which properly controls the analysis.

Finally, by making this argument, Petitioners contradict their own pleadings. As the Ninth Circuit noted in *In Re Ford*, 264 F.3d at 960, when it was to their advantage in this litigation, Petitioners took the exact opposite position:

> As Ford and Citibank correctly stated in their memorandum opposing class certification, '[t]his case, after all, does not involve a common fund or a joint interest among cardholders. Instead, it involves a collection of individual claims based on individual patterns of consumer purchasing decisions.' They concluded that '[b]ecause the [putative] class members in this case do not in any sense possess joint ownership of, or an undivided interest in a common res, their claims…are separate and distinct.'

Petitioners had it right the first time. Simply put, this class action does not meet the requirements for federal court jurisdiction.

CONCLUSION

Wherefore, Trial Lawyers for Public Justice, as *Amicus Curiae* in support of Respondents, respectfully requests this Court to affirm the ruling of the Ninth Circuit that the federal district court below did not have diversity jurisdiction over Respondents' claims.

Respectfully Submitted,

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